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No. 96-1568

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1996

BERNA KAHN TEE, et al.,
Petitioners,
VS.
UAL CORPORATION and
UNITED AIRLINES, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Do Sections 2, Third and 2, Fourth of the Railway Labor Act prohibit a carrier from entering into an agreement with a union concerning the terms under which unrepresented employees of the carrier will participate with union-represented employees in an Employee Stock Ownership Plan that will acquire a controlling interest in the carrier?

RULE 29.6 STATEMENT

United Airlines, Inc. is a wholly-owned subsidiary of UAL Corporation, a publicly traded corporation. Other subsidiaries are: Air Wis Services, Inc.; Four Star Insurance Company, Ltd.; UAL Leasing Corporation; Covia Corporation; Kion de Mexico, S.A. de C.V.; Mileage Plus Holdings, Inc.; United Airlines Credit Corporation; United Aviation Fuels Corporation; United Cogen, Inc.; United GHS Inc.; United Vacations, Inc.; United Worldwide Corporation; Air Wisconsin, Inc.; Domicile Management Services; Inc.; Mileage Plus, Inc.; and Mileage Plus Marketing, Inc.

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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Defendants-respondents UAL Corporation ("UAL") and United Air Lines, Inc. ("United") oppose the petition for writ of certiorari filed by plaintiffs-petitioners ("petitioners"). In this case the Eleventh Circuit determined, in an unpublished per curiam opinion, that the Railway Labor Act

does not prohibit a carrier from entering into an agreement with a union concerning the terms under which unrepresented employees of the carrier will participate with union-represented employees in an Employee Stock Ownership Plan. The Eleventh Circuit's decision poses no conflict with this Court's decisions or the decisions of any other circuit court of appeals, presents no significant legal issue and, indeed, is wholly consistent with longstanding authority of this Court and the lower federal courts construing the Railway Labor Act. Accordingly, a writ of certiorari is unwarranted.

STATEMENT OF THE CASE

Petitioners are six non-union customer service representatives ("CSRs") employed by United who allege that United violated Sections 2, Third and 2, Fourth of the Railway Labor Act, 45 U.S.C. §§ 151 et seq. (the "RLA"), by entering into an agreement with the Air Line Pilots Association, International ("ALPA") and the International Association of Machinists ("IAM") concerning the terms under which CSRs and other non-union employees of United would participate with ALPA- and IAM-represented employees in a multi-billion dollar Employee Stock Ownership Plan ("ESOP") that acquired a controlling interest in UAL during 1994. Petitioners contend that

United was obligated by the RLA to establish the terms for their ESOP participation "unilaterally" without discussing the subject with the unions which represented the other participants in the ESOP. (A 14-15.)

The District Court dismissed the Complaint on the basis that petitioners' allegations failed to state a claim under the RLA. The court noted that petitioners did not allege that United had treated ALPA or the IAM as the collective bargaining representatives of its CSRs, nor did the ESOP prohibit United's CSRs and other non-union employees from selecting, or rejecting, a collective bargaining representative if they desired. (A 23,29.) Under such circumstances, the District Court held, the RLA does not regulate the manner in which an employer sets the terms and conditions for its non-union employees, and United was not prohibited from discussing those terms with ALPA and the IAM. (A 29.)

In an unpublished per curiam decision, the Eleventh Circuit Court of Appeals upheld the District Court's ruling. The court determined that neither the terms of the RLA, nor any case law thereunder, support petitioners' contention that the RLA was intended to govern a carrier's conduct in setting employment terms for unrepresented employees. (A 33-36.)

SUMMARY OF ARGUMENT

This case presents no issue which would warrant granting the petition for writ of certiorari under Supreme Court Rule 10. As petitioners concede, they do not seek to resolve a conflict among the circuit courts of appeals because there is none. (Petition at 8.) Nor is there a significant question of federal law that requires this Court's review.

First, the Eleventh Circuit's decision is in full accord with well-settled principles under the RLA. Petitioners point to no decision of this or any court that supports their basic contention that the employees' right to reject union representation under Sections 2, Third and 2, Fourth of the RLA includes, as a "necessary corollary," the employer's obligation to refrain from discussing with a union the terms and conditions of employment by which unrepresented employees will join with union-represented employees in an Employee Stock Ownership Plan. (Petition at 15.) As the Eleventh Circuit concluded, petitioners' argument is fundamentally flawed. Although Sections 2, Third and 2, Fourth of the RLA protect the right of airline employees to organize and bargain collectively through representatives of their choosing, and to refrain from doing so if they desire, if

employees decide not to be represented by a union, the RLA does not govern how their terms of employment are to be established.

Second, petitioners attempt to establish a contrary principle premised solely on analogies to cases involving the rights of union-represented employees and involving employers governed by a separate statute, the National Labor Relations Act, 29 U.S.C. §§ 151 et seq. ("NLRA"). These analogies are ill-founded. NLRA authority cannot be applied to the RLA in this context, and, in any event, the cases do not stand for the proposition urged by petitioners.

Third, as the Eleventh Circuit held, there is no support for petitioners' assertion that United's conduct somehow coerced them into unionizing. There is no allegation in the complaint that United treated or recognized the unions as the collective bargaining representatives of the CSRs or implemented the CSR's employment terms in an effort to coerce them to join a union. The mere fact that United implemented employment terms that some CSRs may not have liked does not constitute interference with the employees' choice; otherwise, any adverse employer actions would violate the RLA.

Finally, the Eleventh Circuit's opinion will have minimal, if any, impact

beyond the parties to this action. The lower court chose not to select its per curiam decision for official publication; therefore, the opinion neither sets precedent nor has the potential to create confusion among the lower courts, and it provides no basis for this Court's review.

REASONS FOR DENYING THE PETITION

Supreme Court Rule 10 sets forth a detailed list of reasons for granting review on writ of certiorari. Although the grounds set forth in Rule 10 are not an exhaustive measure of the Court's discretion to grant review, review is granted "only for compelling reasons." Such significance may attach when a federal court of appeals has rendered a decision in conflict with another federal court of appeals, when a federal court of appeals has decided a federal question in conflict with a state court of last resort, when a federal court of appeals has markedly departed from accepted judicial practice, when a state court of last resort has decided a federal question in a manner which conflicts with the decision of another state court of last resort or a federal court of appeals, or when a state or federal court of appeals has decided an important question of federal law which should be settled by this Court or which is in conflict with pertinent decisions of

this Court. See Supreme Court Rule 10(a)-(c).

As argued below, none of the enumerated reasons for granting review obtains in this case, nor does the case present any other "compelling" reason for granting review on writ of certiorari.

I. THE ELEVENTH CIRCUIT'S DECISION IS IN ACCORD WITH THE WELL-SETTLED PRINCIPLE THAT THE RAILWAY LABOR ACT DOES NOT GOVERN A CARRIER'S CONDUCT IN SETTING EMPLOYMENT TERMS FOR NON-UNION EMPLOYEES.

In holding that petitioners' allegations did not state a cause of action under the RLA, the Eleventh Circuit followed settled principles under RLA case authority and concluded that while Sections 2, Third and 2, Fourth of the RLA are intended to protect the rights of individuals to form unions or reject collective representation, they do not govern the manner in which the carrier determines the terms and conditions of employment for unrepresented employees. (A 35-36.) There is no basis for petitioners' suggestion that this principle should be overturned.

Petitioners' argument -- that the RLA does, in fact, govern the manner in which a carrier sets employment terms for non-

union employees -- overlooks almost 70 years of jurisprudence under the RLA, during which time no court has ever held, or implied, that Sections 2, Third or 2, Fourth were intended to regulate the manner in which carriers establish the terms and conditions of employment for unrepresented employees. In fact, in the leading decision, Williams v. Jacksonville Terminal Co., 315 U.S. 386, 402 (1942), the Supreme Court held that "where no collective bargaining agreements are or have been in effect," the carrier is free to "arrange its business relations with its employees" because "the Railway Labor Act deal[s] with collective bargaining agreements only, and not with the employment of individuals." Similarly, in International Bhd. of Teamsters v. Brotherhood of Ry. Clerks, 402 F.2d 196, 202 (D.C. Cir.), cert. denied, 393 U.S. 848 (1968), the D.C. Circuit held that the National Mediation Board's determination that a carrier's employees have no collective bargaining representative "relegat[es] the carrier and its employees to employment relationships and contracts not presently governed by the Railway Labor Act."

No court has interpreted the RLA in the manner petitioners suggest. The federal courts typically have invoked Sections 2, Third and 2, Fourth in cases alleging that a carrier has interfered with its employees' rights during a union

organizing drive by discharging union supporters or similar conduct. E.g., Roscello v. Southwest Airlines Co., 726 F.2d 217 (5th Cir. 1984); Griffin v. Piedmont Aviation, Inc., 384 F. Supp. 1070 (N.D. Ga. 1974). The courts have also invoked these sections occasionally in cases following certification of a union where a carrier's conduct -- for example, the discharge of striking employees -- undermines the union's collective bargaining rights. E.g., Air Line Pilots Ass'n, Int'l v. United Air Lines, Inc., 802 F.2d 886 (7th Cir. 1986), cert. denied, 480 U.S. 946 (1987). There are, however, no decisions of which United is aware in which the courts have invoked these sections to regulate how carriers determine the terms and conditions for employment for employees who reject union representation, and at least one decision has rejected such an attempt. See Herring v. Delta Air Lines, Inc., 894 F.2d 1020, 1023 (9th Cir.), cert. denied, 494 U.S. 1016 (1990) ("No private cause of action exists under the RLA for a group of employees who assert retaliatory conduct based upon employee activities which bear no relationship to establishing a union, or to employer activities that bear no relationship to undermining a union.").[1]

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[1] Russell v. National Mediation Bd., 714 F.2d 1332, 1343-44 (5th Cir. 1983), (continued...)

Petitioners argue that although the RLA does not generally regulate the terms and conditions of unrepresented employees, a "necessary corollary" to the employees' right to decline representation is the carrier's obligation not to discuss with any union the terms and conditions of employment for employees who are not lawfully represented by that union. (Petition at 15.) Petitioners conclude that the Eleventh Circuit's decision renders "superfluous" or "meaningless" the express statutory right "not to join or remain members of any labor organization." 45 U.S.C. § 152, Fourth. (Petition at 13.) Petitioners rely for this proposition primarily on Virginian Ry. v. System Fed'n No. 40, 300 U.S. 515 (1937) and Medo Photo

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[1](...continued)
cert. denied, 467 U.S. 1204 (1984) cited by petitioners, does not support their position. In Russell, the court found that the National Mediation Board had not properly investigated a representational dispute, thereby depriving employees of the option to vote against any representation at all in elections conducted by the National Mediation Board. The Russell decision specifically acknowledges that the RLA was intended to encourage collective bargaining. 714 F.2d at 1343-44. Russell, then, does not stand for the proposition that Congress intended the RLA to govern the manner in which carriers determine the terms and conditions of employment for unrepresented employees.

Supply Corp. v. NLRB, 321 U.S. 678 (1944). Neither case supports petitioners' claims.

The principle established in Virginian Ry., and applied in Medo Photo and the other related decisions cited by petitioners is that Section 2, Ninth of the RLA "imposes the affirmative duty to treat only with the true representative, and hence the negative duty to treat with no other." 300 U.S. at 548. By its very terms, however, the affirmative obligation to treat only with the certified representative -- and thus the negative obligation to treat with no other -- arises under Section 2, Ninth only where the employees have selected a bargaining representative. Where, as here, employees have rejected representation, the obligation to treat with the certified representative does not arise, the principles of Virginian Ry. are patently inapplicable, and the RLA simply has no further application with respect to how their terms of employment are to be established.[2] This case provides no reason

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[2] Application of the principles underlying Virginian Ry. to unrepresented employees would lead to absurd results. For example, the obligation to treat with the certified union does not preclude an employer from negotiating with another union; it simply precludes such negotiations without the first union's (continued...)

for overturning these settled principles of RLA jurisprudence.

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[2](...continued)
consent. In the present case, for example, ALPA and the IAM each negotiated with United over terms applicable to all participants of the ESOP, and it would have been impossible to have established the ESOP any other way. With respect to United's unrepresented employees, however, there was no union that could have consented to such negotiations and there was no way to include the unrepresented employees in the ESOP absent discussion with the unions who would also participate.

In addition, as petitioners acknowledge, the duty to treat under Section 2, Ninth precludes a carrier not only from dealing with another union, but also from dealing with the employees directly. (Petition at 16.) See Medo Photo Supply Corp. v. NLRB, 321 U.S. 678, 683-84 (1943)(although employees proposed wage increase, it was unfair labor practice for employer to grant wage increase to employees to induce them to leave union); Order of R.R. Telegraphers v. Telegraphers, 321 U.S. 342, 346-47 (1944)(carrier could not implement individual wage increases without notice to the employees' union representative required by RLA). If this principle were applied to unrepresented employees, as petitioners urge, an employer could not even enter into individual contracts with its unrepresented employees.

II. THE NATIONAL LABOR RELATIONS ACT CASES CITED BY PETITIONERS DO NOT APPLY TO THIS RAILWAY LABOR ACT CASE AND, IN ANY EVENT, DO NOT CONFLICT WITH THE ELEVENTH CIRCUIT'S DECISION.

Having conceded that this case poses no conflict among the federal courts of appeals (Petition at 8), petitioners nonetheless argue that the Eleventh Circuit's construction of Section 2, Third and 2, Fourth cannot be "squared" with federal court decisions that forbid an employer to bargain with a union concerning terms and conditions of employment of employees the union does not represent. (Petition at 19.) Petitioners rely exclusively on authority under the NLRA. These cases are irrelevant and inapposite, however, because NLRA authority cannot be applied to the RLA in this context, and, in any event, the cases do not stand for the proposition urged by petitioners.

This Court has cautioned that the NLRA cannot be "imported wholesale" into the railway labor arena and that even rough analogies must be drawn "circumspectly," with due regard for the many differences between the statutory schemes.[3]

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[3] For example, Section 7 of the NLRA creates an express statutory right to

(continued...)

Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 383 (1969). This is particularly true in the present case because virtually all of the cases cited by petitioners arise under the unfair labor practice jurisdiction of the National Labor Relations Board.[4] The RLA

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[3](...continued)
refrain from "any and all" concerted activities, whereas Sections 2, Third and 2, Fourth of the RLA contain no such provision. Thus, all of the NLRA authority cited by petitioners for this proposition is distinguishable because it relies on the express Section 7 right to refrain from concerted activities. Section 7 of the NLRA also differs from Sections 2, Third and 2, Fourth, of the RLA in that the RLA contains no general protection of concerted activities unrelated to union organization. Johnson v. Express One Int'l, Inc., 944 F.2d 247, 252 (5th Cir. 1991). The cases cited by petitioners interpreting such rights under the NLRA, e.g., Black Grievance Committee v. NLRB, 749 F.2d 1072 (3d Cir. 1984), cert. denied, 472 U.S. 1008 (1985), are therefore irrelevant to the RLA.

[4] See, e.g., Carry Cos. of Ill., Inc. v. NLRB, 30 F.3d 922 (7th Cir. 1994) (discussing coercion under Section 8 of the NLRA); International Ladies' Garment Workers' Union v. NLRB, 366 U.S. 731 (1961) (same); NLRB v. Clegg, 304 F.2d 168 (8th Cir. 1962) (same); NLRB v. Exchange Parts Co., 375 U.S. 405 (1964) (same); Welch Scientific Co. v. NLRB, 340 F.2d 199 (2d Cir. 1965) (same).

does not establish unfair labor practices as such, and this Court has cautioned that federal court jurisdiction under Sections 2, Third and 2, Fourth should be limited to those circumstances where it is necessary to enforce an express statutory command. Trans World Airlines, Inc. v. Independent Fed'n of Flight Attendants, 489 U.S. 426, 441 (1989). More importantly, petitioners rely principally on cases holding that it constitutes an unfair labor practice under the NLRA to recognize a union which does not have majority support. Under the RLA, the courts have no jurisdiction over such claims because they fall within the sole purview of the National Mediation Board. International Bhd. of Teamsters v. Texas Int'l Airlines, Inc., 717 F.2d 157 (5th Cir. 1983).[5]

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[5] Thus, even if United had recognized the IAM as petitioners' collective bargaining representative (and there is no allegation it did so), such a claim would not entitle petitioners to relief in federal court. It is well established that the RLA does not prohibit a carrier from voluntarily recognizing, or bargaining with, an uncertified union as the representative of its previously non-union employees. See D. Leslie, The Railway Labor Act 199 (1995); Galveston Wharves, 4 N.M.B. 200, 203 (1962). In such a circumstance, the National Mediation Board has exclusive jurisdiction to determine whether the voluntarily recognized union enjoys support of a majority of the

(continued...)

Moreover, all of the decisions cited by petitioners involve facts that are simply inapposite to the issues in this Petition. These cases support the proposition that under the NLRA it constitutes an unfair labor practice for an employer to recognize a union that does not represent a majority of employees in the bargaining unit (see e.g., NLRB v. Clegg, 304 F.2d 168 (8th Cir. 1962)), or for a union to seek such recognition. See e.g., Sperry Sys. Management Div. v. NLRB, 492 F.2d 63 (2nd Cir.), cert denied, 419 U.S. 831 (1974). In the present case, however, there is no allegation that United recognized or dealt with ALPA and the IAM as the

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[5](...continued)
employees, and the courts are without jurisdiction. International Bhd. of Teamsters v. Texas Int'l Airlines, Inc., 717 F.2d 157 (5th Cir. 1983). Upon application of the employees involved, the National Mediation Board would conduct an election to determine if the IAM had majority support and, if not, would certify the representative which did or declare that no union represented the employees. In re Chamber of Commerce, 14 N.M.B. 347 (1987). Thus, if United had actually done what petitioners claim to fear -- that is, to recognize the IAM as the collective bargaining representative of petitioners and other CSRs when a majority of those employees did not want union representation -- those employees would have a remedy under the RLA, but not before the federal courts.

representatives of petitioners or other non-union employees, or that the unions sought to be recognized as the CSRs' bargaining agent. Rather, as the Eleventh Circuit found, United dealt with the unions as representatives of their respective employee groups. (A 36.)

Finally, the decisions cited by petitioners that involve the negotiation of contract terms for employees that the union does not represent are consistent with the Eleventh Circuit's analysis. In both Virginia Sprinkler Co. v. Road Sprinkler Fitters Local No. 669, 868 F.2d 116, 122 (4th Cir. 1989), and Sperry Sys. Management Div. v. NLRB, 492 F.2d 63, 70 (2nd Cir.), cert. denied, 419 U.S. 831 (1974), the courts held that it would be proper for a union to seek to negotiate regarding the terms and conditions of employees it did not represent when those terms "vitally affected" the employment of employees the union did represent. See generally Allied Chemical Workers, Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 179 (1971)(employment terms of those outside of bargaining unit are proper subjects of bargaining if they "vitally" affect employment terms of employees within unit; court declined to find such "vital" connection between retirees' benefits and benefits of active employees). In the present case, negotiations concerning the terms by which United would include the

non-union employees in a company-wide ESOP with union-represented employees clearly met this standard.[6]

The Eleventh Circuit correctly rejected petitioners' attempts to overturn established principles of RLA law on the basis of inapposite and inapplicable authority. Contrary to petitioners' assertion, the Eleventh Circuit's decision fully "squares" with pertinent RLA

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[6] Any prospective purchaser of equity in a corporation has a legitimate interest in the cost structure of the company it is considering buying, and agreements to maintain or reduce wages and benefits in anticipation of an acquisition are commonplace. Cf., Barthelemy v. Air Lines Pilots Ass'n, 897 F.2d 999 (9th Cir. 1990) (rejecting challenge under RLA to agreement executed between ALPA and financier Carl Icahn in anticipation of Icahn's acquisition of Trans World Airlines). The fact that a third party -- be it a shareholder, a potential acquiror, or a financial institution considering a loan to the corporation -- requires the corporation as a condition of a transaction to hold wages or benefits at a specific level does not mean that the third party is negotiating on behalf of the corporation's employees. To the contrary, the third party is clearly negotiating in its own interest. The fact that the acquiror is a union representing some of the corporation's employees should not change the analysis.

authority and poses no issue warranting scrutiny by this Court.

III. THE ELEVENTH CIRCUIT CORRECTLY DETERMINED THAT UNITED'S CONDUCT DID NOT COERCE PETITIONERS IN THE EXERCISE OF PROTECTED RIGHTS UNDER THE RAILWAY LABOR ACT.

Petitioners' final argument is that United's conduct in discussing their participation in the ESOP with ALPA and IAM tended to "coerce" petitioners into unionizing in violation of Section 2, Fourth of the RLA. (Petition at 26.) Petitioners complaint contained no allegation that United imposed unsatisfactory terms on unrepresented employees in an effort to influence or coerce them into unionizing, or that United recognized ALPA and IAM as representatives of petitioners. The Eleventh Circuit's conclusion -- that absent such allegations, petitioners' complaint did not state a claim for violation of Section 2, Third or 2, Fourth -- was correct.

First, even if, as petitioners argue, some employees might view the ESOP agreement so negatively that they would elect a union to escape from it, that does not constitute a violation of the RLA. While Section 2, Fourth prohibits a carrier from interfering with the free choice of its employees to accept or reject union

representation, it certainly does not constitute interference for an employer to establish an employment policy that some of its non-union employees do not like. Otherwise, as the Eleventh Circuit noted, any "adverse" action arguably could constitute a violation of the RLA. (A-35.)

The flaw in petitioners' argument is clearly demonstrated by their assertion that it does not matter whether United's non-union employees actually objected to inclusion in the ESOP because a grant of benefits can "influence" or "coerce" employees in their choice of union representation just as easily as a denial of benefits. (Petition at 27.) Under petitioners' theory, however, it would violate the RLA even when an employer increased wages or benefits for its non-union employees because the natural effect of such increases is to discourage unionization. This cannot be the law.

Second, contrary to petitioners' argument, United's decision regarding the CSRs' participation in the ESOP did not become coercive simply because it arose in the course of union negotiations.[7] United

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[7] Again, petitioners rely exclusively on authority concerning unfair labor practices under the NLRA, which, as discussed, supra, is irrelevant in the RLA (continued...)

was obligated under Section 2, First of the RLA to negotiate with ALPA and the IAM over their ESOP proposal. Air Line Pilots Ass'n, Int'l. v. UAL Corp., 874 F.2d 439 (7th Cir. 1989). The fact that the unions' proposal was conditioned on United's compelling its non-union employees to participate in the ESOP does not alter that obligation. Under petitioners' theory, United violated Sections 2, Third and 2, Fourth of the RLA by complying with Section 2, First. As the Fifth Circuit noted under similar circumstances in Atlanta & West Point R.R. v. United Transp. Union, 439 F.2d. 73, 81 (5th Cir.), cert. denied, 404 U.S. 825 (1971), "it would be ludicrous to hold that the railroads' undertaking of a statutory duty to bargain with the [one union] constituted an attempt to 'interfere with, influence, or coerce' [members of a different union], a violation of the Railway Labor Act, Section 2, Third . . . . To say that the performance of this legal obligation was illegal is a non-sequitur to which we cannot subscribe."

Moreover, as the Eleventh Circuit was careful to note, there is no allegation

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[7](...continued)
context. See, e.g., Welch Scientific Co. v. NLRB, 340 F.2d 199 (2d Cir. 1965); Black Grievance Committee v. NLRB, 749 F.2d 1072 (3d Cir. 1984), cert. denied, 472 U.S. 1008 (1985).

that United recognized or treated any union as the representative of the CSRs. There is, therefore, no substance to petitioners' claim that the Eleventh Circuit's decision sets a "dangerous precedent" that would allow employers to "recognize" minority unions.

Finally, it was not United's negotiation with the IAM and ALPA that allegedly harmed petitioners, but implementation by United of the wage and benefit reductions set forth in the ESOP agreement. United could have implemented the same reductions, or more onerous ones, without ever talking to the IAM or ALPA, and even if a federal court were to order rescission of those wage reductions, United could "unilaterally" implement the very same reductions the next day. There is simply no meaningful distinction between voluntarily implementing wage and benefit reductions and voluntarily entering into an agreement with a third party to do so. Thus, while petitioners complain about the coercive effect of United's discussion with the unions regarding their participation in the ESOP, their complaint is actually directed at the changes in the terms and conditions of their employment, not the manner in which those changes were decided. The Eleventh Circuit correctly held that the RLA does not provide the means for petitioners to redress their dissatisfaction.

IV. THE PETITION SHOULD BE DENIED FOR OTHER REASONS

In addition to the above reasons, this is an inappropriate case for the Court's review because the opinion of the Eleventh Circuit was not selected for official publication and therefore cannot serve as precedential authority. Thus, even if the Eleventh Circuit's opinion was incorrect -- which it is not -- the opinion still would not create any confusion among the lower courts as to the proper application of this Court's precedents and interpretation of the RLA.[8]

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[8] Petitioners append several news articles, not part of the record below, in an attempt to convince this Court that other carriers may engage in similar ESOP negotiations. (Petition at 12; A 41-53.) There is no authority for including such extraneous material in the appendix. (See Supreme Court Rule 14.) At any rate none of the articles mentions the opinion in this case nor suggests that the Eleventh Circuit's unpublished decision has had any influence on such ESOP negotiations. Thus, they are irrelevant to the Petition and should be stricken.

CONCLUSION

Petitioners have raised no conflict in their petition that requires resolution by this Court nor any other "compelling" reason to justify granting review of the Eleventh Circuit's decision in this case. Accordingly, the petition should be denied.

Respectfully submitted,

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